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PP

v.

DAVOUD FOTOOHIGHAREHMASJED SHABAN

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HIGH COURT MALAYA, KUALA LUMPUR
AMELIA TEE ABDULLAH J
[CRIMINAL TRIAL NO: 45A-03-03-2012]
6 NOVEMBER 2012

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CRIMINAL LAW: *Dangerous Drugs Act 1952 - Section 39B(1)(a) - Trafficking in 1,408.5 grams methamphetamine - Disparity in weight of drugs - Whether reasonable doubts arose as to identity of exhibits - Whether accused's passport tendered in court - Whether investigating officer conducted proper investigation - Whether prima facie case established - Looi Kow Chai & Anor v. PP*

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The accused, an Iranian, was charged for an offence of trafficking in 1,408.5 grams methamphetamine, an offence under s. 39B(1)(a) Dangerous Drugs Act 1952. The incident occurred in a hotel when the raiding officer ('PW5') observed the accused *via* the hotel's CCTV, collecting a box from the reception and proceeded back to his room ('the said room'). PW5 then alerted his team and upon entering the said room, he saw the accused sitting on the bed. The items recovered from the accused's room were, *inter alia*: (i) a black pouch which contained few documents; (ii) the accused's Iranian passport; (iii) a bag containing shirts and trousers; and (iv) two pairs of shoes. Few organisers were found on the bed and the sides of it were cut open by PW5 with a knife whereby transparent plastic bags containing drugs were recovered. The exhibits secured from the said room were then handed over to the investigating officer ('PW10'). Disparities were found in the weight of the drugs seized whereby PW5's record differed from that of the chemist ('PW4'). On the other hand, PW10 was unable to produce the accused's passport in court as he explained that the said passport was handed over to another police officer when the accused was charged in the Sessions Court. It was PW10's contention that the passport was not returned back to him and as such, its present whereabouts were unknown. During cross-examination, it was put to PW10 that the differences in the weight of the drugs as weighed by PW5 and PW4 together with the missing exhibits points to the fact that the exhibits kept by him had been disturbed when they were kept in his locked steel cabinet. In brief, it was the accused's argument,

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inter alia, that: (i) the identity of the exhibits were in doubt; and (ii) there was significant difference between the weight of the drugs seized and which was handed over to PW4.

Held (acquitting and discharging accused without calling for his defence):

(1) PW5 was unable to offer any explanation as to why his weighing should be less than that of PW4 by 94.55 grams and 34.28 grams for exhs. P13A and B and P13C and D respectively or why there should be an excess in his weighing by 27.38 grams for exh. P13 and F. Hence, there was a disparity in the recorded weight by PW5 and the gross weight recorded by PW4 which was too substantial to be ignored. (paras 77 & 81)

(2) The court was unable to accept PW10's explanation in relation to the accused's passport. The fact that the passport was not produced right up to the close of the prosecution case pointed irresistibly to the fact that the present whereabouts of the passport was unknown. Further, the lack of meticulousness of PW10 in carrying out his duties in this case was quite apparent. This could be seen from, *inter alia:*, (i) failure to preserve exhibits which he intended to send for fingerprint dusting; and (ii) failure to draw a sketch plan of the room indicating where the various exhibits seized were found. (para 82)

(3) PW10 failed to conduct proper investigation as to the number of occupants in the said room in light of evidence pointing to more than one occupant, such as the hotel registration form which lists two guests, clothes and shoes found in the bags which were of different sizes. No attempt was made by PW10 to send the clothing for DNA testing to ascertain if all those items belongs to the accused. (para 82)

(4) The court had evaluated the evidence of the prosecution witnesses to determine if the defence should be called. The substantial difference in the gross weight of the plastic bags weighed by PW4 compared with that which was weighed by PW5, coupled with the evidence of the loss of exhibits which pointed to PW10's integrity of safekeeping the exhibits having been compromised, would raise a reasonable doubt as to the identity of the exhibits in this case. (para 83)

A **(5)** At the end of the prosecution case, the court asked itself the following question, *ie*, "if I call on the accused to enter upon his defence and he elects to remain silent, am I prepared to convict him on the totality of the evidence adduced in the prosecution case". This question was answered in the negative
B and as such, the court found that the prosecution had failed to make out a *prima facie* case against the accused which if unrebutted or unexplained would have warranted his conviction (*Looi Kow Chai & Anor v. PP*; refd). (paras 73 & 84)

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Case(s) referred to:
Lee Chee Meng v. PP [1992] 1 CLJ 345; [1992] 1 CLJ (Rep) 168 SC ***(refd)***
Looi Kow Chai & Anor v. PP [2003] 1 CLJ 734 CA ***(refd)***
Magendran Mohan v. PP [2011] 1 CLJ 805 FC ***(refd)***
D *Tan Yew Choy v. PP [2009] 4 CLJ 245 FC* ***(refd)***
Yeong Kia Heng lwn. PP [1992] 1 CLJ 364; [1992] 1 CLJ (Rep) 372 MA ***(refd)***

Legislation referred to:
E Dangerous Drugs Act 1952, s. 39B(1)(a)

For the prosecution - Viknesvaran Purnshatman; DPP
For the accused - Datuk N Sivananthan (A Tamara with him); M/s Sivananthan

F *Reported by Kumitha Abd Majid*

JUDGMENT

G **Amelia Tee Abdullah J:**

Decision

[1] The accused, Davoud Fotoohigharehmasjed Shaban No. PP: N 19179840, was charged for an offence under s. 39B(1)(a)
H of the Dangerous Drugs Act 1952. The charge against him reads as follows:

> Bahawa kamu pada 25.10.2011 jam lebih kurang 2.35 petang di dalam bilik No. 506, Hotel Sri Petaling, Jalan Radin Anum, Bandar Baru Sri Petaling, di dalam Daerah Brickfields, di dalam
I Bandaraya Kuala Lumpur, Wilayah Persekutuan, telah mengedar dadah berbahaya iaitu Methamphetamine seberat 1408.5 gram, dan dengan itu kamu telah melakukan satu kesalahan di bawah Seksyen 39B(1)(a) Akta Dadah Berbahaya 1952 yang boleh dihukum di bawah Seksyen 39B(2) Akta yang sama.

The Prosecution's Case

[2] The prosecution called a total of 11 witnesses to prove its case. Acting on information received about drug trafficking activities at the Hotel Sri Petaling, the raiding officer, Inspector Basri bin Husain (PW5) had on 24 October 2011 at about 10pm directed two of his police personnel to carry out surveillance in the vicinity of the lobby of the Hotel Sri Petaling, and particularly towards Iranian nationals staying at the said hotel. And on 25 October 2011 at about 10am, he briefed his raiding team which comprised some 11 officers and personnel as to the raid that was to be carried out in the area of the Hotel Sri Petaling. The officers and police personnel were divided into three groups in cars and one motorcycle group and were directed to carry out surveillance outside the hotel.

[3] On arrival at the hotel at 1.30pm, PW5 headed straight for the CCTV room where he met with Encik Azhar bin Mohd Astar (PW3), the hotel's head of security. He identified himself and his purpose at the hotel and sought PW3's co-operation in carrying out his surveillance. He was viewing the CCTV from about 1.30pm.

[4] At about 2.15pm, whilst he was in the CCTV room, he saw a male Iranian who was wearing a short sleeved T-shirt, short pants, sports shoes and a pouch bag coming out of room 506 and heading towards the lifts. When he exited the lifts at the ground floor, he was seen heading towards the reception counter where he collected a yellow coloured box on which was written "DHL EXPRESS". He then moved back to the lifts and returned to room 506 alone. At the same time, PW5 informed all members of his raiding team who were in the vicinity of the hotel *vide* walkie-talkie to assemble at the lobby for the purpose of carrying out a raid and effecting an arrest. In relation to the CCTV recording, PW5 agreed that he did not retrieve the said recording from the hotel.

[5] The assembled raiding team headed towards room 506 together with Encik Azhar, the hotel's security. On arrival, PW5 attempted to open the door quietly but found it to be locked. He then directed Encik Azhar to open the door with an access card. When the door was opened, PW5 attempted to push it open but found it to be latched from inside. He then directed D/Kpl Nadzir

to kick open the door at the latch area. The door was kicked open with two kicks. When the latch was ripped off and the door opened, PW5 and his team rushed into the room shouting "Police! Police! Police!".

[6] On entering the room PW5 testified that he saw the male Iranian, whom he had seen earlier on the CCTV, sitting on the bed with his body facing the television and holding a green retractable blade ("pisau tolak"). There was a black organiser on the bed in front of him. One side of the organiser had been cut and a portion of a transparent plastic could be seen sticking out from that side of the organiser. There were two other organisers on the bed to the right of the Iranian. There was a DHL box and in it were a few documents written in Jawi and three books. PW5 describes the accused's reaction at that time as "tergamam dan terkejut".

[7] PW5 would have the court believe that despite the fact that there was first an attempt to open the door which failed because it was latched, and then there were two kicks to break the latch and to force open the door, the accused was still sitting on the bed and holding a knife in his right hand and with an organiser on the bed near his leg. During cross-examination he agreed that he did not actually see the accused cutting open any organiser and could not be certain if the organiser that was cut had already been cut when it was in the box.

[8] PW5 testified that one of his police personnel was the first to enter the room. PW5 was either the second or the third person to enter the room. He maintained that when he entered, the accused was still sitting on the bed and holding the knife in his right hand. He did not attempt to throw away the organiser or the knife. PW5 agreed that the accused had a chance to do so as the process of attempting to open the door only to face a latch and the kicking in of the door would have generated quite some noise. In relation to the credibility of this version of events, the court records this rather strange exchange:

> PUT: Versi anda bahawa OKT duduk atas katil memegang pisau tolak dan organiser P12A tidak masuk akal memandangkan OKT sudah ada cukup amaran bahawa ada orang yang hendak masuk bilik secara paksaan.
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> ANS: Setuju.

However, during re-examination, PW5 attempted to explain that he did not understand the suggestion which was put to him. He then sought to deny the defence suggestion.

[9] The male Iranian was arrested and a body search was conducted on him but no drugs were found. PW5 then carried out a thorough search of the room. The items recovered from the room were as follows:

(i) On the table beside the television, PW5 found a black pouch bag Pama PM Collection brand and in it were a few documents such as an arrival card under the name of Davoud Fotoohigharehmasjed Shaban, two hand phones and a Samsung digital camera;

(ii) From a black Nike pouch bag which was on the bed, PW5 recovered an Iranian Passport for Davoud Fotoohigharehmasjed Shaban whom he identified as the accused, a key ring with six keys, one Hotel Sri Petaling card access, a wallet with Iranian currency;

(iii) Two bags were found on the floor beside the bed:

(a) A black bag Polo King brand containing shirts and trousers; and

(b) A red backpack Oceanfly Flight brand containing shirts, trousers and shoes.

[10] PW5 next carried out a closer examination of the organiser which was on the bed. When first examined, only the left side of the organiser was opened. The right side was not yet open and it was PW5 who cut open that side. When the sides were opened, PW5 found two transparent plastic bags containing a white powder which was suspected to be syabu. PW5 weighed both bags together with a weighing scale provided by the department and found them to weight 850 grams. The organiser was marked 'B' and the two plastic bags B1 (left) and B2 (right).

[11] When the second organiser was opened, PW5 found that when pressed, there was a hard object at the sides. When the right and left sides of the organiser were opened with the green pisau tolak, PW5 recovered a transparent plastic bag from each side of the organiser. PW5 marked the organiser 'C' and affixed his signature and the date. The plastic bag recovered from the left was marked 'C1' whilst that recovered from the right was marked 'C2'. The weight of the two plastic bags was 820 grams.

[12] As regards the third organiser, which was marked 'D' by PW5, a plastic bag containing a white powder suspected to be syabu recovered from the left side of the organiser was marked 'D1' whilst that recovered from the right was marked 'D2'. The weight of these two bags was 820 grams. As such, in total, six transparent plastic bags were recovered from the three organisers.

[13] PW5 denied that there were in total four organisers and that it was he who had cut open all four organisers to recover the bags of drugs.

[14] PW5 identified exh. P32 as a document which was affixed on the top of the DHL box (P18). He testified that he had detached the document before handing it over to the investigating officer. He also identified a thick sheaf of documents in Jawi (P33) and three books (P34A, B & C) as exhibits recovered from the box which was also handed over to the investigating officer. He had also handed to the investigating officer the passport of the accused which he had seized.

[15] PW5 duly placed his identification markings, his signature and the date on all the exhibits recovered. PW5 and his raiding team then took the accused and all the exhibits down to the cashier counter in the lobby of the hotel where he obtained a receipt of payment under the name of Davoud Fotoohigharehmasjed Shaban. It is worth noting that according to PW5, all the bags of drugs and the organisers were placed in the DHL box and carried by PW5 whilst the rest of the exhibits were placed in the two bags - the Polo King and the Oceanfly Flight - and placed in the bonnet of PW5's vehicle for the journey back to Bahagian Narkotik, IPD Brickfields.

[16] On arrival at IPD Brickfields, PW5 proceeded to the meeting room where he dealt with all the documentation in relation with this case. Two search lists were prepared, namely P15A which dealt with the DHL Box, the three organisers and their contents, the green pisau tolak and the room access card whereas the search list marked P15B dealt with the rest of the exhibits recovered from room 506.

[17] PW5 lodged a police report (P16) pertaining to the raid and arrest. The police report made on 25 October 2011 gives the date of the raid and the arrest of the accused as 15 October 2011 when it should have been 25 October 2011. Although PW5 claimed to have made another report on that same day at 7.30pm

to correct that error in the date, however that report was rendered inadmissible by reason of failure to comply with s. 51A of the Criminal Procedure Code.

[18] The exhibits were handed over by PW5 to the investigating officer, Inspector Fithri Hajirin bin Iberahim (PW10) on 25 October 2011 and two Perakuan Serah dan Terima Barang Kes (P17A & P17B) were signed between them to place on record the handing over of the exhibits.

[19] On 26 October 2011, PW5 together with the investigating officer, Inspector Fithri, and a police photographer, D/Kpl Ahmad Zafri bin Mat Noor (PW2), went to the place where the accused was arrested at room 506 Hotel Sri Petaling. There, the investigating officer directed the police photographer to take photographs of the hotel, the lobby, in front of room 506 and the interior of room 506. From these photographs (P7A-J), photographs 'G', 'H' and 'I' are of considerable assistance. Photograph 'G' is taken from the doorway of room 506 and it shows the view of the room from the doorway. Photograph 'H' shows the door taken from inside the room. More specifically, it shows that the latch of the door had been ripped off as a result of the door being kicked in. Photograph 'I' is a close-up view of the bed and the room.

[20] During cross-examination, PW5 was queried in detail about the contents of the bags found in room 506. There were two pairs of shoes in the Polo King bag (P29). The black shoes were a size 41 whereas the red shoes were a size 42. PW5 confessed that he was unsure if there were two persons staying in the said room. PW5 was referred to exh. P27 which he had obtained from the hotel registration counter. This is a document showing the registration particulars of the hotel guest when checking in. He agreed that according to this document, there were two guests for room 506.

[21] PW5 was also cross-examined as to the contents of the Polo King and Oceanfly Flight bags. He agreed that both bags had their own clothes. He agreed that from the different sizes of the clothes and the shoes, the room had more than one occupant. He also agreed that then two bags were consistent with there being two occupants.

[22] PW5 was also cross-examined about the two search lists P15A and P15B. Both documents list a room excess card. He agreed that in P15A, the access card is listed as being recovered from room 506 whereas in P15B, the access card is described as being recovered from the Nike pouch bag (P21). Notwithstanding what is stated in the two search lists, PW5 did not agree that two access cards were recovered from two different places in the room. He insisted that only one access card was recovered and that was from a Nike pouch bag which was on the bed.

[23] PW5 agreed that when he had handed over the exhibits to the investigating officer, the latter had checked all the items before he appended his signatures on the Perakuan Serah dan Terima Barang Kes (P17A & P17B). He agreed that looking at P17A and P17B, the investigating officer had received two access cards.

[24] PW5 was cross-examined about the differences in weight of the drugs as weighed by him compared to the weight that was recorded by the chemist, PW4. The differences in weight recorded can be seen below:

	PW5	Chemist	Difference
P13A & B	850 grams	755.45 grams	Less 94.55 grams
P13C & D	820 grams	785.72 grams	Less 34.28 grams
P13E & F	820 grams	847.38 grams	Extra 27.38 grams

[25] PW5 was unable to offer any explanation for why his weighings should be less than that of the chemist by 94.55 grams and 34.28 grams for exhs. P13A and B and P13C and D respectively or why there should be an excess in his weighing by 27.38 grams for exh. P13E and F.

[26] PW5's evidence as to what had happened leading to the raid and arrest of the accused received corroboration from D/Sjn Wiklei a/l Ei Prom Keow (PW9). He was part of PW5's raiding team on the day in question. He headed group 2 which comprised himself, D/Kpl Muhamad Ali and D/Kpl Zolkifli. On arrival at Hotel Sri Petaling at about 1.30pm, his team was directed to carry out surveillance outside the hotel.

[27] At about 2.30pm, instructions were received to assemble in front of the lifts to carry out a raid on a room on the 5th floor. PW9's group together with other members of the raiding team as well as Encik Azhar had headed for room 506. In front of the room, PW5 had attempted to open the door slowly and stealthily

("secara perlahan-perlahan dan senyap") but was unable to open the door. PW5 had then given a signal to Encik Azhar to open the door with his access card. When the door was opened, it was found to be latched from the inside. There was no noise when this was done. PW5 then directed Kpl Basri to kick open the door. He did so twice and the door was opened. There was some noise at this stage although it is PW9's evidence that the noise was not very loud.

[28] PW9 testified that when the door was opened and the team entered, he saw:

> Seorang warga asing duduk atas katil dengan keadaan kaki kanan di atas katil dan kaki kiri di bawah. Tangan kanan memegang pisau hijau dan tangan kiri memegang organiser hitam atas kaki di hadapannya. Muka warga asing mengalih ke arah kami. Reaksinya tergamam.

The first time he saw the accused, he was still holding a knife in his right hand and had his left hand on the organiser. The court observed PW9 demonstrating what he saw - his right hand on his leg and holding a knife and his left hand on the organiser on the bed.

[29] PW9's evidence as to what was recovered from the room is consistent with the evidence of PW5. The relevant aspects of what he saw were the organiser in front of the accused and two other organisers on his right and on the bed. A DHL box was in front of the accused on the bed. Other items on the bed were the three books, the documents in Jawi and the Nike pouch bag. The Polo King and the Oceanfly Flight bags were on the floor whereas the Pama PM Collection pouch bag was on the table.

[30] It is PW9's evidence that when the raiding team first entered the room, one side of the organiser in front of the accused had been opened and there was a plastic packet of powderish substance. PW9 had demonstrated to court how the left side of the organiser had been opened and the plastic packet of drugs could be seen. He did not agree that when the door was kicked open, the accused was already in the process of moving towards the door. It was put to him that it did not make sense for the accused to be still sitting on the bed after the door had been kicked open to this PW9 responded that they had entered quickly and the accused was "terlalu tergamam".

[31] PW5 had then opened the right side of the organiser and had taken out the packet of drugs. There were two other organisers to the right of the accused and after PW5 had opened the right and left sides of the organisers, they recovered a plastic bag from each side.

[32] PW9's role was only to assist PW5. He did not mark any of the exhibits and neither did he see PW5 mark the exhibits.

[33] The prosecution called a few employees of Hotel Sri Petaling who played a role, *albeit* some of them only minimally, in this case. Azhar bin Mohd Astar @ Harun (PW3) was the security officer at Hotel Sri Petaling at the material time. His working hours are from 7am to 3pm. When he arrived at work in the CCTV Control Room on 25 October 2011, he met with two police personnel who requested his assistance to view the hotel's CCTV for the 5th floor. Two other police personnel had come in for a change of shift at 8pm. Later, others had also entered the control room. Between 7am and 3pm, the number of police personnel who came in and out of the control room was about ten persons. PW3 himself was going in and out of the control room that morning. However, there was police personnel in the control room at all times.

[34] There were three CCTV cameras on the 5th floor. PW3 identified Inspector Basri bin Husain (PW5) as the police officer who had requested his assistance to view the CCTV. He remembered that the police had wanted to observe a man who was staying in room 506.

[35] PW3 testified that there was a raid on room 506 at about 1pm where the police team had arrested a man in the said room. As the security officer of the hotel, PW3 was present during the raid although he was only present outside the room at the time. Initially, PW3 was unable to remember what had happened during the raid. However, after he was allowed by court to refresh his memory from his s. 112 statement (P8), he was able to recall what had happened. He confessed that if not for P8, all that he could remember was that a man was arrested in room 506.

[36] PW3 testified that he was asked by Inspector Basri to obtain the access card for room 506 from housekeeping. PW3 had obtained the card from Soliza, the housekeeping supervisor. Outside room 506, PW3 saw a police personnel holding the door handle. The handle had to be pushed down in order for it to

open. However, at that time PW3 was towards the rear and a few rooms away and thus he did not see whether the police personnel had actually pressed down the handle. At that time, PW3 had already obtained the access card.

[37] Inspector Basri had then asked PW3 to open the door using the access card. When the room was unlocked, it was found to be latched from inside. Thereafter, the police had broken the latch of the room and rushed into the room. PW3 did not enter the room and did not know what had happened in the room.

[38] In respect of the CCTV recording, PW3 told the court that the police had asked for and he had given them the CCTV recording in respect of the lobby and the corridor of the 5th floor a few days after the incident.

[39] Soliza binti Md Saleh (PW6) is the housekeeping supervisor at Hotel Sri Petaling. At about 2pm, she was at room 502 when Encik Azhar (PW3) had asked her for the access card to room 506 because the police had wanted to conduct a search of the said room. After she had handed the card to him outside the room, she had moved a few rooms away. She did not enter room 506. And after about 30 minutes, she had asked for the return of the access card from PW3.

[40] PW6 testified that she saw Encik Azhar open the door but the door was latched. She did not hear the police kick open the door as she had passed that spot although she was still on the 5th floor.

[41] At the material time, Nurshafiqah bte Babu (PW8) was working as a receptionist at the Hotel Sri Petaling. On 24 October 2011, she was working the afternoon shift from 3pm to 11pm. On the said date, an Iranian national had checked into the hotel. Only one person had checked in. He had handed over his passport to enable her to do the registration. She could not remember his name. He had paid RM450 for two nights including the deposit. She had given him a room access card, a registration card to sign and a deposit receipt.

[42] PW8 identified P27 as the registration card issued by her under the name of Davoud Fotoohigharehmasjed Shaban. In P27, the number of guests is recorded as '2'. PW8 explained that she

had written '2' because the room was suitable for double occupancy. According to her, when she first started work her manager had instructed her to list as '2' if the room had a double bed. On that day, only one guest had checked into room 506. PW8 had also identified P26 as a receipt that she had issued. However, during cross-examination, PW8's evidence had changed somewhat when she testified that the words in P27 including the word '2' were written by her supervisor named Fazlina. PW8 had only checked in the guest.

[43] During examination-in-chief and re-examination, PW8 had testified that she had given the guest in room 506 only one access card. However during cross-examination, she had told the court that if the registration card lists two occupants, then two access cards would be given. The court finds PW8's evidence in relation to the number of occupants and access cards to be contrary, inconsistent, and confusing.

[44] On 25 October 2011, PW8 had worked from 7am to 3pm. She had received a yellow DHL box package. The name of the recipient was written on a piece of paper on top of the box. She identified the label P32 as the document which she saw on the DHL box. PW8 had checked the name on the box with the guest register and determined that the recipient was staying in room 506. In fact, on the day that the guest had checked in, he had requested to be called if a package should come for him.

[45] PW8 had then called the guest in room 506. He had come down to the lobby where the DHL courier was still waiting. The guest and the DHL courier had dealt with the delivery of the box and the guest had then gone upstairs with the box. The guest was alone when he came down to the lobby and when he went upstairs again.

[46] Between 24 October 2011 and 25 November 2011, she had met with the guest in room 506 only twice, at the time when he had checked in and when the DHL box had arrived. She had identified the accused as the guest in room 506.

[47] The prosecution had also called Zulkipli bin Haji Shaharah (PW7), the courier from DHL who testified as to the delivery of a box to a customer named Davoud Fotoohigharehmasjed Shaban at Hotel Sri Petaling. On arrival at the hotel, he had gone to the

registration counter and met with a receptionist named Cik Shafiqah (PW8) and informed her that he wanted to deliver a box. Cik Shafiqah had called the owner of the box. After about five to ten minutes, the guest had come down to the lobby where PW7 was waiting at the counter. PW7 had asked him for his passport and checked whether the name was the same as the name on the box. And then he had asked the recipient to sign the delivery document, and he had done so. The delivery document has since been handed back to the DHL office.

[48] PW7 identified the accused as the recipient of the box. He identified P18 as the DHL box and P32 as the document on the box. At the time of the delivery, P32 was inserted in a plastic pocket in front of the box together with the Airway Bill (P35). He confirmed that at the time when the box was delivered to the accused, P32 and P35 were in a pocket on the box.

[49] The chemist, Suhana binti Ismail (PW4) tendered her curriculum vitae (P9) which sets out her qualifications, training, experience, and area of expertise. The court has no hesitation in accepting her as an expert in her stated field.

[50] On 31 October 2011, PW4 received a box marked 'SF' and sealed with PDRM 422 from Inspector Fithri Hajirin. She opened the box and compared its contents with the police request form before she registered the exhibits and gave a Nombor Makmal - PJ (FOR) 13649/11-0. She then issued to Inspector Fithri a receipt with the Nombor Makmal and her signature (P10).

[51] In box SF, she found three black organisers marked as B, C and D and six plastic bags marked B1, B2, C1, C2, D1 and D2, filled with a clear crystal matter. When she was not carrying out her analysis, the exhibits were kept in her locked steel cabinet in the strong room in the department.

[52] PW4 commenced her analysis on 11 January 2012. First she measured the gross weight of the six plastic bags separately using a calibrated Top-Pan measuring scale. Next she emptied each of the plastic bags and weighed each of the bags separately. By deducting the weight of the bags from the gross weight, she derived that the nett weight of the clear crystal substance in each of the bags to be as follows:

B1 - 368.8 grams
B2 - 376.5 grams
C1 - 370.8 grams

A C2 - 404.6 grams
D1 - 401.2 grams
D2 - 437.2 grams.

[53] PW4 carried out her analysis on each of the six bags separately. She carried out three tests, namely the colour test, the Chromatography Gas Mass Spectrometry (CGMS) test, and the quantitative test. Since the method of carrying out her analysis is not in dispute, the court does not propose to go into detail about the tests. However, the results following her analysis is another matter altogether.

[54] After her analysis, PW4 found the six plastic bags to contain methamphetamine with the following weight:

B1 - 199.2 grams
B2 - 203.2 grams
C1 - 194.3 grams
C2 - 298.2 grams
D1 - 187.4 grams
D2 - 326.2 grams, thus giving a total of 1408.5 grams of Methamphetamine.

[55] According to PW4, the tests carried out by her are recognised by the United Nations Office on Drugs and Crime (UNODC). Methamphetamine is listed in the First Schedule of the Dangerous Drugs Act 1952.

[56] After her analysis, PW4 had returned the balance of the contents of the six plastic bags into six separate plastic bags which were supplied by her. These, together with their original plastic wrappers and the three organisers were then replaced in the box marked SF. The sealed box and her chemist report (P11) were handed back to Inspector Fithri Hajirin Iberahim on 2 March 2012 at 11.10am.

[57] During cross-examination, PW4 was queried at length about her calculations. In her evidence, she gave the weight of the plastic bags as 5.45 grams for B1; 4.90 grams for B2; 5.56 grams for C1; 4.76 grams for C2; 4.49 grams for D1 and 4.49 grams for D2. She also gave the following percentages of methamphetamines in the different plastic bags:

B1 - 54.0%
B2 - 52.4%
C1 - 52.4%

C2 - 73.4%
D1 - 46.7%
D2 - 74.6%.

[58] Although the Top-Pan balance gives readings up to two decimal points, PW4 testified that it is the practice in the Narcotics Section to report the weights up to one decimal point only. Thus, for plastic bag B1, 54% of 368.8 grams is 199.15 grams. However, she had rounded it up to 199.2 grams. Similarly for the other bags:

B2 - 52.4% of 376.3 grams = 203.2 grams
C1 - 52.4% of 370.8 grams = 194.29 grams, rounded up to 194.3 grams
C2 - 73.4% of 404.6 grams = 298.19 grams, rounded up to 298.2 grams
D1 - 46.7% of 401.2 grams = 187.36 grams, rounded up to 187.4 grams
D2 - 74.6% of 437.2 grams = 326.15 grams, rounded to 326.2 grams.

[59] PW4 admitted that she had made a mistake in this case by rounding up the amounts of methamphetamines in the six plastic bags.

[60] Inspector Fithri Hajirin bin Iberahim (PW10) is the investigating officer in this case. On 25 October 2011 at about 7.15pm, after being informed of an arrest of an Iranian national named Davoud Fotoohigharehmasjed Shaban by Inspector Basri bin Husain, PW10 had met Inspector Basri at IPD Brickfields where he was handed the exhibits in this case, namely three organisers and six plastic packets containing syabu weighing 2490 grams, the accused and his personal belongings. He also received a copy of Petaling Report 016367/11 lodged by Inspector Basri and two search lists (P15A and P15B). He had signed two Perakuan Serah dan Terima Barang Kes (P17A & P17B) on which he had affixed his signature to evidence the handing over of the exhibits to him from Inspector Basri.

[61] According to PW10, he had brought the accused and all the exhibits back to JSJN, IPK Kuala Lumpur. The six plastic bags containing substance suspected to be syabu were marked by PW10 with his signature and kept in a drawer in his locked steel cabinet in his room. The organisers were also marked with his signature and these he kept in a box in his office. He did not place any markings on the other exhibits.

[62] According to PW10, he had checked the two search lists (P15A & P15B) against the two Perakuan Serah dan Terima Barang Kes (P17A & P17B). Although the item 'Kad akses Hotel Sri Petaling' was allegedly recovered from room 506 as seen in P15A and an 'access card Hotel Sri Petaling Kuala Lumpur' was allegedly recovered from a Nike pouch bag at the accused's waist as shown in P15B, however PW10 would have the court believe that only one access card was recovered and handed over to him. The court queries why PW10 would have signed both P15A and P15B if indeed he was only handed one access card. The court notes that despite being asked this question four times, all that the witness could answer was that he only received one card without offering any explanation as to why he should append his signature to acknowledge receipt of two cards if indeed only one card had been handed over to him.

[63] The court notes that while PW10 was able to produce most of the exhibits in this case, some of the items in P15A & B and P17A & B were not produced in court. These are:

(i) A passport bearing the name Davoud Fotoohigharehmasjed Shaban No. N 19179840;

(ii) Arrival Card BA 0076288027 for Fotoohigharehmasjed Davoud Shaban;

(iii) Departure Card BA 0076288985 for Fotoohigharehmasjed Davoud; and

(iv) One other room access card.

[64] In respect of the passport, PW10 offered the explanation that he had received the passport from the complainant on 25 October 2011 and had kept it in his locked steel cabinet. On 8 November 2011 when the accused was charged in Mahkamah Sesyen Jenayah 7, he had brought the accused's passport. He claimed to have handed the passport over to a police officer who was on duty as a prosecuting officer and whose name he could not remember. He claimed that he had handed over both the passport and the investigation papers. The investigation papers were subsequently returned to him but not the passport. The court finds this explanation to be more than a little lame especially in light of his own evidence that as the investigating officer in this case, he could have asked for the return of the passport. The court further notes that for some three days before PW10 took

the witness stand, the issue about the missing passport was repeatedly raised. The question that arises is this: If PW10 knew that the passport was not before the court and this issue about the missing exhibit would become a problem for the prosecution case, why then had he not taken immediate steps to obtain or recover the passport and to bring it to court? The continued absence of the passport right until the close of the prosecution case would lead to the irresistible conclusion that PW10 does not know the present whereabouts of the passport in question.

[65] PW10 had also baldly admitted that items No. 10 and No. 11 in P15B were handed over to him *vide* P17B but that he had lost them. No explanation was advanced by him as to how this could have happened. The court finds this turn of events to be most unsatisfactory.

[66] As the investigating officer, PW10 had arranged for photographs to be taken of the exhibits as well as of the scene. The court notes that only one photograph (P6) was taken of the exhibits. This photograph shows the organisers and the six plastic bags of drugs. No photographs were taken of the many other exhibits, especially the green retractable blade ("pisau tolak") which is a very material exhibit.

[67] Similarly the photographs taken of the scene (P7A-J) could have been better done. No photographs were taken of the CCTV room where surveillance of the 5th floor was carried out. Neither was any photograph taken of the reception counter where the accused allegedly took delivery of the DHL box containing *inter alia* the three organisers and the six plastic bags of drugs. In this case, PW10 had not drawn a sketch plan of room 506 depicting the various spots in the room where the various exhibits were recovered. In the absence of a sketch plan, photographs taken of relevant areas of the hotel and the room would have given added insight to the court of the scene.

[68] PW10 claimed to have carried out investigations as regards the DHL box and the identity of the person who had sent the box. On the box was a plastic bag containing two documents (P32 and P35). From these two documents, it can be seen that the sender is Madadi Alou Salman from Salam Hotel, Marjeh Sq, Damascus, Syria. And the recipient is Davoud Footohighi Ghare Masjedi @ Hotel Sri Petaling, 30 Jalan Radin Anum, Bandar Baru

Sri Petaling. That is the sum total of his investigations in respect of the identity of the sender. The court is of the view that since it is the prosecution case that the three organisers containing the six plastic bags of dangerous drugs were sent to the accused, then the identity of the sender is of paramount importance. More effort should have been made to investigate this aspect of the case. Regrettably, nothing was done by PW10 apart from telephoning DHL.

[69] According to PW10, on 31 October 2011, at 10am, he had brought the three organisers and the six plastic bags containing syabu to the Forensic Department for the purpose of fingerprint dusting. The six plastic bags were placed in the organisers and carried "secara membimbit". At the Forensic Department, he had met with a female Inspector whose name he could not recall for the purpose of fingerprint dusting. In light of the fact that PW10 did not appear to have taken any positive steps to preserve the six plastic bags nor the three organisers, it is not at all surprising that no fingerprints or at all were lifted from a total of nine exhibits.

[70] That same day, after the profitless sojourn to the Forensic Department, PW10 had sent the exhibits to the chemist, Suhana binti Ismail (PW4) for analysis.

[71] During cross-examination, it was put to PW10 that the differences in the weight of the drugs as weighed by PW5 and the chemist together with the missing exhibits point to the fact that the exhibits kept by him had been disturbed ("usik") when they were kept in his locked steel cabinet.

Findings And Decision At The Close Of The Prosecution Case

[72] In coming to a decision at the close of the prosecution case, the court has carefully perused the evidence adduced by the prosecution through its 11 witnesses and examined the documentary evidence tendered in support of its case. Section 180 of the Criminal Procedure Code which sets out the procedure to be followed at the conclusion of the prosecution case reads as follows:

> 180. (1) When the case for the prosecution is concluded, the Court shall consider whether the prosecution has made out a *prima facie* case against the accused.

(2) If the Court finds that the prosecution has not made out a *prima facie* case against the accused, the Court shall record an order of acquittal.

(3) If the Court finds a *prima facie* case has been made out against the accused on the offence charged the Court shall call upon the accused to enter on his defence.

(4) For the purpose of this section, a *prima facie* case is made out against the accused where the prosecution has adduced credible evidence proving each ingredient of the offence which if unrebutted or unexplained would warrant a conviction.

[73] Both the learned Deputy Public Prosecutor and learned counsel for the accused have submitted authorities as regards the meaning of a *prima facie* case. In the case of *Looi Kow Chai & Anor v. PP* [2003] 1 CLJ 734 cited by the learned Deputy, the Court of Appeal had occasion to deal with the meaning of a *prima facie* case. At p. 749, His Lordship Gopal Sri Ram JCA had held as follows:

[3] Under s. 180 of the Criminal Procedure Code (Revised 1999), the duty of a judge, sitting alone, at the close of the case for the prosecution, is to determine, as a trier of fact, whether the prosecution has made out a *prima facie* case against the accused. The judge has only one exercise to undertake; he must subject the evidence of the prosecution to a maximum evaluation and then ask himself this question: If I decide to call the accused to enter on his defence, and he elects to remain silent, am I prepared to convict him on the totality of the evidence contained in the prosecution's case? If the answer is in the negative, then no *prima facie* case has been made out, and the accused is entitled to an acquittal. (Subjecting the prosecution's evidence to a maximum evaluation to determine if the defence is to be called does not mean that the prosecution has to prove its case beyond a reasonable doubt at that intermediate stage).

[3a] Consequently, a judge is not to undertake an initial minimum evaluation of the prosecution's evidence (followed by a maximum evaluation if the accused elects to remain silent) under s. 180 of the Criminal Procedure Code (Revised 1999).

[74] The case of *Looi Kow Chai & Anor (supra)* was referred to in the more recent Federal Court case of *Magendran Mohan v. PP* [2011] 1 CLJ 805 cited by learned counsel for the accused. At p. 824, His Lordship Alauddin Mohd Sheriff PCA found as follows:

> The test at the end of the prosecution's case is "*prima facie* case" based on a maximum evaluation of evidence. The evidence has to be scrutinized properly and not perfunctorily, cursorily or superficially. If the evaluation of the evidence results in doubts in the prosecution's case, then a *prima facie* case has not been made out. The defence ought not to be called merely to clear or clarify such doubts.

[75] Learned counsel for the accused has submitted a plethora of issues upon which it submits that the accused should be acquitted and discharged without calling for his defence. The court does not propose to deal with each and every one of these issues but only with the more serious and valid issues.

[76] Learned counsel for the accused has submitted that the identity of the exhibits which form the very basis of the charge against the accused is in doubt. These doubts have arisen from the evidence of the witnesses called by the prosecution itself. There is a clear, obvious and significant difference between the weight of the drugs which was seized and that which was handed over to the chemist (PW4) for analysis. From the evidence of the raiding officer, PW5, on the gross weight of the drugs seized as compared with the evidence of the chemist, PW4, the court notes the following difference in the weight recorded:

	PW5	Chemist	Difference
P13A & B	850 grams	755.45 grams	Less 94.55 grams
P13C & D	820 grams	785.72 grams	Less 34.28 grams
P13E & F	820 grams	847.38 grams	Extra 27.38 grams

[77] The court finds the disparity in the recorded weighted by the raiding officer, which amounts are also reflected in the police report (P16) lodged by him pertaining to the arrest, and the gross weight recorded by the chemist to be too substantial to be simply cast aside and ignored.

[78] Learned counsel for the accused has cited a number of authorities on this point. In the case of *Lee Chee Meng v. PP* [1992] 1 CLJ 345; [1992] 1 CLJ (Rep) 168, the arresting officer said that he recovered a total of 61 packets of drugs; the chemist

said that he received a total of 64 packets for analysis. The investigating officer said that there were a total of 76 packets. In that case, the Supreme Court held that:

> Where there is a serious doubt as to the identity of the exhibits as clearly is the case here, it cannot be said that the prosecution has established a *prima facie* case under the charge.

[79] In the case of *Yeong Kia Heng lwn. PP* [1992] 1 CLJ 364; [1992] 1 CLJ (Rep) 372, PC Ng Hum Seng (SP3) testified that when he searched the appellant at the Pertama Komplex he found a total of 25 plastic packets containing "ketulan-ketulan berwarna merah jambu". However, the chemist (SP2) testified that he received a total of 25 packets containing "bahan serbuk berwarna merah jambu". And at p. 374, the Supreme Court had held as follows:

> Keterangan yang tersebut di atas menunjukkan kecacatan dalam pembuktian identiti barang kes yang menjadi subject pendakwaan terhadap perayu. Kecacatan ini menjadi lebih ketara apabila keterangan dari pihak polis dibandingkan dengan keterangan pegawai kimia berkenaan dengan berat barang kes. Mengikut pihak polis berat barang kes ialah 113 gram. Ini ialah keterangan daripada Insp. Che Nor Ismail (SP5). Mengikut keterangan pegawai kimia (SP2) pula, berat barang-barang yang diterimanya dari pihak polis ialah 102.85 gram, iaitu perbezaan lebih dari 10 gram.
>
> Berdasarkan kepada keterangan-keterangan yang tersebut di atas wujudlah satu keraguan yang serius berkenaan dengan identiti barang kes. Memandangkan kepada keterangan sebegini rupa berkenaan dengan identiti-identiti barang kes, perayu sememangnya tidak dikehendaki dipanggil untuk membela dirinya di atas pertuduhan itu.

[80] And in the Federal Court case of *Tan Yew Choy v. PP* [2009] 4 CLJ 245, the raiding officer weighed the cannabis and found it to be 140 grams and 65 grams, thus making a total of 205 grams. The investigating officer also weighed the cannabis and confirmed that the weight obtained by him was 205 grams. However, according to the chemist, the total weight of the cannabis is 151.08 grams and 73.57 grams, totalling 224.65 grams. The Federal Court found merit in the arguments of learned counsel for the appellant and agreed with the contention that there was serious doubt as to the weight of the cannabis, thus affecting the identity of the cannabis. The court said that by the

time the cannabis reached the hands of the chemist, the cannabis had increased in weight by 19.65 grams. And at p. 252, His Lordship Zulkefli Makinudin FCJ stated as follows:

> We are of the view that if we were to accept the reasons given by the learned trial judge as representing the correct law it means that the identity of the exhibit when it is first recovered is immaterial as ultimately what is important is the weight as determined by the chemist. With respect, that is not the law. In the present case the appellant has shown there is a discrepancy in that the nett weight of the cannabis as determined by the chemist exceeded the gross weight of the cannabis when they were first recovered by the police. It would therefore follow that the prosecution cannot be said to have proven the offence of trafficking beyond reasonable doubt against the appellant. A reasonable doubt has been created as to whether the cannabis that was recovered by the police that was sent to the chemist for analysis is the same substance that is found to be cannabis and it is in respect of that substance that the appellant is charged with trafficking. (See the case of *Gunalan Ramachandran & Ors v. PP* [2004] 4 CLJ 551). On this ground alone the appellant would succeed in his appeal.

[81] The court notes that PW5 was unable to offer any explanation as to why his weighing should be less than that of the chemist by 94.55 grams and 34.28 grams for exhs. P13A and B and P13C and D respectively or why there should be an excess in his weighing by 27.38 grams for exhs. P13E and F.

[82] This fact becomes even more pertinent when considering that PW10 had been cross-examined at length as regards the integrity of the safe-keeping of the exhibits seized from room 506. In this context, the court would summarise that the following factors lend weight to the defence's submissions and queries as regards the integrity and identity of the exhibits:

(i) The loss of exhibits which were itemised in P15A and P15B as well as in P17A and P17B at the time when they were kept by the investigating officer. These include such items as the Arrival Card and Departure Card of the accused as well as his passport. The court is unable to accept PW10's feeble explanation that the passport had been handed over to some unknown and unnamed prosecuting officer for the simple reason that were it true, it would not have been unduly difficult to ascertain the identity of that person and to speedily recover the passport. As stated earlier, the court finds that the

fact that the passport was not produced right up to the close of the prosecution case despite much furore having been raised as to its absence, points irresistibly to the fact that the present whereabouts of the passport is sadly unknown;

(ii) The lack of meticulousness of the investigating officer (PW10) in carrying out his duties in this case is quite apparent. This can be seen from a number of aspects such as the nonchalance with which he signed P17A and P17B thus acknowledging receipt of two access cards when he claimed to have only received one card; failure to preserve exhibits which he intended to send for fingerprint dusting; failure to submit proper documentation/request form to the Forensic Department for the fingerprint testing and failure to obtain a proper written result of the testing; failure to obtain the delivery document from DHL; failure to draw a sketch plan of the room indicating where the various exhibits seized were found;

(iii) The failure to obtain a proper CCTV recording of the surveillance on the 5th floor and the lobby. The court is of the view that the CCTV recording would have been of substantial assistance to the prosecution had it been available. The court finds PW10's explanation that after he found that the CCTV recording which he downloaded into his pen drive was corrupted by virus, he had gone back to see Encik Azhar the next day to obtain another recording only to be told that the recording had been erased to be not credible; and

(iv) The failure of PW10 to conduct a proper investigation as to the number of occupants in room 506 in light of evidence pointing to more than one occupant, such as the Hotel Registration Form which lists two guests, and clothes and shoes found in the bags in the room which are of different sizes. No attempt was made by PW10 to send the clothing for DNA testing to ascertain if all these items belong to the accused.

[83] At the end of the prosecution case, the court has carefully considered the evidence adduced by the prosecution. The court has evaluated the evidence of the prosecution witnesses to determine if the defence should be called. The court finds that apart from the many smaller but valid issues which have been raised by the defence, the most important and pertinent is the

A doubt that has been raised in relation to the identity of the exhibits in this case. The court is of the considered view that the substantial difference in the gross weight of the plastic bags as weighed by the chemist compared with that which was weighed by PW5, coupled with evidence of loss of exhibits, thus pointing
B to the integrity of PW10's safekeeping of the exhibits having been compromised, would raise a reasonable doubt as to the identity of the exhibits in this case.

[84] Thus at the end of the prosecution case when the court
C asks itself the question: If I call on the accused to enter upon his defence and he elects to remain silent, am I prepared to convict him on the totality of the evidence adduced in the prosecution case, the answer of the court is in the negative. In the circumstances, the court finds that the prosecution has failed to
D make out a *prima facie* case against the accused which if unrebutted or unexplained would have warranted his conviction. Accordingly, the court herewith acquits and discharges the accused without calling for his defence.

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